127-471

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 166.

THE GLACIER MOUNTAIN SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

J. FRANK WILLIS, CHARLES BUCKLAND AND DONALD M. FROTHINGHAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED NOVEMBER 1, 1884.

The relator contends that the documentary evidence admitted was not accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in Mexico, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of Mexico.

The certificates are undoubtedly defective, but Judge Blatchford *In re* Fowler, 18 Blatch., 437, held that authentication may be made by oral proof given here. (See also *In re* McPhun, 30 Fed. Rep.,57, In re Wadge, 15 Led. Rep., 865, 16 Id., 333). The evidence in support of the certificates in this case which was given by the witness Alas was under the rules laid down in these cases competent and sufficient.

E. HENRY LACOMBE.

April 9, 1888.

127-471

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 166.

THE GLACIER MOUNTAIN SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

J. FRANK WILLIS, CHARLES BUCKLAND AND DONALD M. FROTHINGHAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED NOVEMBER 1, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 166.

THE GLACIER MOUNTAIN SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

J. FRANK WILLIS, CHARLES BUCKLAND AND LONALD M. FROTHINGHAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print.
Caption	*a*	1
Complaint	1	1
Summons	3	2
Proof of service of summons	5	3
Demurrer of J. Frank Willis to complaint	6	4
Demurrer of all defendants to complaint	7	5
Order sustaining demurrer	9	6
Amended complaint	10	6
Demurrer to amended complaint	13	7
Second amended complaint	15	9
Demurrer to second amended complaint	20	11
Order sustaining demurrer, &c.	22	12
Bond	24	12
Writ of error	26	14
Citation	28	15
Proof of service of citation	29	16
Clerk's certificate	30	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 10, 1887.

a Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Complaint.

Be it remembered that heretofore and on, to wit, the 11th day of July, A. D. 1883, came the Glacier Mountain Silver Mining Company, by M. B. Carpenter, Esq., its attorney, and filed in said court its complaint and sued out of and under the seal of said court a writ of summons against J. Frank Willis, Charles Buckland, and Daniel M. Frothingham, and the said complaint is in words and figures as follows, to wit:

1 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States in and for the District Aforesaid.

THE GLACIER MOUNTAIN SILVER MINING COMPANY, Plaintiff,

vs.

J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD M. FROTHINGHAM, Defendants.

The plaintiff complains and alleges—

I. That it is a corporation organized and existing under and by virtue of the laws of the State of Ohio and is a citizen of said State of Ohio; that the defendants are and each of them is a citizen of the State of Colorado, and that the property in controversy in this suit exceeds the value of five hundred dollars.

II. That on the 1st day of July, 1883, and ever since hitherto the plaintiff was and is the owner and in actual occupation of the Silver Gate tunnel, site tunnel, dump, and rights thereto appurtenant and all lodes therewith connected, situate in Snake River min-
2 ing district, Summit county, Colorado; that it claims the right to occupy and possess the said premises by virtue of full compliance with the local laws and rules of miners in said mining district, the laws of the United States and of the State of Colorado, and by actual prior possession as a tunnel claim located on the public domain of the United States.

III. That on the 2d day of July, 1883, the defendants wrongfully entered upon the same and ousted the plaintiff, claiming the same as the Tempest lode, and that defendants have ever since hitherto wrongfully withheld the possession of the said premises from the plaintiff, to its damage in the sum of one thousand dollars.

Wherefore plaintiff prays judgment against the defendants—

1. For the recovery of the possession of said Silver Gate tunnel, site tunnel, dump, and appurtenances.

2. For the sum of one thousand dollars damages for the wrongful withholding thereof.

3. For costs of suit.

(Signed) M. B. CARPENTER,
Attorney for Plaintiff.

3 Endorsed: 1256. Circuit court of the U. S., district of Colorado. The Glacier Mountain Silver Mining Co. *vs.* J. Frank Willis *et als.* Complaint. Filed Jul- 11, 1883. (Signed) Edward F. Bishop, clerk. M. B. Carpenter, att'y for plaintiff.

Summons.

And the said summons is in words and figures as follows, to wit:

4 UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado

THE GLACIER MOUNTAIN SILVER MINING COMPANY, Plaintiff,

versus

J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD M. FROTHINGHAM, Defendants.

Complaint. Filed in the clerk's office this eleventh day of July, A. D. 1883.

The President of the United States of America to the above-named defendants, Greeting:

You and each of you are hereby notified that an action has been brought in said court by the above-named plaintiff against you as defendants to recover the possession of certain specific real property situate in Snake River mining district, Summit county, State of Colorado, to wit, the Silver Gate tunnel, site tunnel, dump and appurtenances, together with the sum of $1,000.00 damages for the wrongful withholding of said premises and for the costs of this suit, as more fully set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service, and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complainant, and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this eleventh day of

July, A. D. 1883, and of the Independence of the United States the 108th year.

[Seal Circuit Court U. S.]

(Signed) EDWARD F. BISHOP, *Clerk*,
By —— ——, *Deputy Clerk.*

5 Endorsed: Gen. No. 1256. Circuit court of the United States for the district of Colorado. The Glacier Mountain Silver Mining Co., plaintiff, *versus* J. Frank Willis *et al.*, defendants. Summons. Filed this 25th day of Oct., A. D. 1883. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. M. B. Carpenter, of Denver, attorney for plaintiff.

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

AUGUST 28, A. D. 1883.

I hereby certify that I received the within writ on the 13 day of July, A. D. 1883, and that I have personally served the same upon the said defendant, J. Frank Willis, by delivering to J. Frank Willis personally a true copy of the within writ at the day and time as follows: As to J. Frank Willis, at Denver, county of Arapahoe, on the 14 day of July, A. D. 1883. This writ therefore returned partly executed, as the law directs, this 25th day of October, A. D. 1883.

(Signed) WALTER A. SMITH, *Marshal*,
By ELMER LUESLEY,
Special Deputy Marshal.

Marshal's fees:

Service, 1 def'ts, at $2.00 ea.	$2 00
Mileage, 2 m's, at 6c., going only	12
Total	$2 12

Paid by M. B. Carpenter.

Attached Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

DENVER, *October 25th, A. D.* 1883.

I hereby certify that I received the within attached writ on the 26th day of August, A. D. 1883, and that I have personally served the same upon the said defendant, Charles Buckland, at Denver, Arapahoe county, Colorado, October 17th, A. D. 1883; as to Donald M. Frothingham, not found in my district.

(Signed) WALTER A. SMITH, *Marshal*,
JOHN W. BELCHER,
Deputy Marshal.

Marshal's fees:

Service, 1 def'ts	$2 00
Travel, Denver to Montezuma, 131 m's, at 6c., going only	7 86
	$9 86

Paid by M. B. Carpenter.

6 *Demurrer to Complaint.*

And afterwards and on, to wit, the 25th day of July, A. D. 1883, came the said defendant, J. Frank Willis, by Frank Hardenbrook, Esq., his attorney, and filed in said court and in said cause his demurrer to the complaint herein, and the said demurrer is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

THE GLACIER MOUNTAIN SILVER MINING COMPANY, Plaintiff,

vs.

J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD M. FROTHINGHAM, Defendants.

The above-named J. Frank Willis, appearing individually in his own behalf, by James R. Hammond and Frank M. Hardenbrook, his attorneys, demurs to the complaint of the plaintiff herein, and for cause of demurrer alleges—

1st. That the said complaint is ambiguous, unintelligible, and uncertain.

7 2d. That the said complaint does not state facts sufficient to constitute a cause of action.

(Signed) J. FRANK WILLIS,
By JAS. R. HAMMOND, AND
FRANK M. HARDENBROOK,
His Att'ys.

Endorsed: 1256. In the United States circuit court. The Glacier Mountain Silver Mining Company *vs.* J. Frank Willis *et al.* Separate demurrer of J. Frank Willis. Filed Jul- 25, 1883. (Signed) Edward F. Bishop, clerk. James R. Hammond and Frank M. Hardenbrook, att'ys for Willis.

Demurrer of All Def'ts to Complaint.

And afterwards and on, to wit, the 3rd day of August, A. D. 1883, came the said defendants, by Frank M. Hardenbrook, Esq., their attorney, and filed in said court and in said cause their demurrer to the complaint herein, and said demurrer is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado. }

In the Circuit Court of the United States in and for the District Aforesaid.

8 THE GLACIER MOUNTAIN SILVER MINING COMPANY, Plaintiff,

vs.

J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD M. FROTHINGHAM, Defendants.

The above-named defendants demur to the complaint of the said plaintiffs, and for cause of demurrer allege—

1st. That said complaint does not state facts sufficient to constitute a cause of action.

2d. That said complaint is ambiguous, unintelligible, and uncertain in this, that it appears "that on the 1st of July, 1883, and ever since hitherto the plaintiff was and is the owner and in the actual possession" of the property sought to be recovered; and it further appears that from the 2d day of July, 1883, the defendants have been in the possession of the property sought to be recovered.

That it appears by said complaint that the property sought to be recovered is real property, but such property is not described by legal subdivisions or by its meet-s and bounds.

That the rights appurtenant and lode connected with said Silver Gate tunnel are not mentioned nor described.

(Signed) JAMES R. HAMMOND AND
FRANK M. HARDENBROOK,
Att'ys for Def'ts.

9 Endorsed: No. 1256. Circuit court of the United States, district of Colorado. The Glacier Mountain Silver Mining Co. *vs.* J. Frank Willis. Demurrer to complaint. Filed Aug. 3, 1883. (Signed) Edward F. Bishop, clerk. Jas. R. Hammond, Frank M. Hardenbrook, att'ys for def'ts.

Order. Demurrer to Complaint Sustained.

And afterwards and on, to wit, the 21st day of August, A. D. 1883, the same being in vacation preceding the October term, A. D. 1883, of said court, at chambers, before the Honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

THE GLACIER MOUNTAIN SILVER MINING COMPANY
vs.
J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD M. FROTHINGHAM. } 1256.

For possession of specific real property and for damages.

This day this cause came on to be heard on the demurrer of the defendants to the plaintiff's complaint, Mr. Hardenbrook appearing for def'ts and Mr. Carpenter for plaintiff.

10 And thereupon it is considered by the court that the said complaint is not sufficient in law to be answered unto, and the said demurrer is sustained; and on motion of said plaintiff time for twenty days from this day is allowed for amending said complaint.

Amended Complaint.

And afterwards and on, to wit, the 8th day of September, A. D. 1883, came the said plaintiff, by M. B. Carpenter, Esq., its attorney, and filed in said court and in said cause its amended complaint, and said amended complaint is in words and figures as follows, to wit:

In the Circuit Court of the U. S.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

THE GLACIER MOUNTAIN SILVER MINING COMPANY, Plaintiff,

vs.

J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD M. FROTHINGHAM, Defendants.

The plaintiff, by leave of court first had and obtained, present this its amended complaint, and, complaining of the defendants, alleges—

I. That it is a corporation organized and existing under the laws of the State of Ohio and is a citizen of the State of Ohio;

11 that the defendants are and each of them is a citizen of the State of Colorado, and that the property in controversy in this suit exceeds the value of five hundred dollars.

II. That on the first day of July, 1883, and ever since hitherto, the plaintiff was and is the owner and in actual occupation of the Silver Gate tunnel and tunnel site, situate at the base of Glacier Mountain, commencing near the base of said mountain east of Bear creek and running southeast and parallel with Coley tunnel through said mountain five thousand feet from the mouth or starting point of said tunnel at a stake marked and in or at the mouth of said Silver Gate tunnel and two hundred and fifty feet northeast and two hundred and fifty feet southwest from said stake or tunnel to its termination. Said tunnel site is situate on Glacier Mountain, in Snake River mining district, county of Summit and State of Colorado, and is five thousand feet in length by five hundred feet in width, and was located June 21st, 1865, by Joseph Coley and George C. Reeves, both citizens of the United States, and embraced a tunnel, dump, and rights thereto appurtenant and all lodes therewith connected or intersected by said tunnel; that it claims the right to occupy and possess the said premises by virtue of full compliance with the local, State, and congressional laws, and by actual prior possession as a tunnel claim located on the public domain of the United States.

12 III. That on the 2nd day of July, 1883, the defendants wrongfully entered upon said premises and wrongfully ousted the plaintiff therefrom, claiming the same as the Tempest lode and War Eagle tunnel, and that defendants have ever since hitherto wrongfully withheld the possession of the said premises from the plaintiff, to its damage in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against the defendants—

1. For the recovery of the possession of said Silver Gate tunnel, site, dump, and appurtenances.

2. For the sum of one thousand dollars damages for the wrongful withholding thereof.

3. For costs of suit.

(Signed) M. B. CARPENTER,
Attorney for Plaintiff.

I hereby accept service of copy of above-amended complaint this 7th day of September, A. D. 1883.

(Signed) FRANK M. HARDENBROOK,
Attorney for Defendant.

Endorsed: 1256. Circuit court of the U. S., district of Colorado. Glacier Mountain Silver Mining Company *vs.* J. Frank Willis *et als.* Amended complaint. Filed Sep. 8, 1883. (Signed) Edward F. Bishop, clerk. M. B. Carpenter, for plaintiff.

13 *Demurrer to Amended Complaint.*

And afterwards and on, to wit, the 8th day of September, A. D. 1883, came the said defendants, by F. M. Hardenbrook, Esq., their attorney, and filed in said court and in said cause their demurrer to

the amended complaint herein, and said demurrer is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States.

THE GLACIER MOUNTAIN SILVER MINING COMPANY, Plaintiff,
vs.
J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD M. FROTHINGHAM, Defendants.

The above-named defendants demur to the amended complaint of the plaintiff, and for cause of demurrer allege—

1st. That said amended complaint is ambiguous, unintelligible, and uncertain, in this, that said amended complaint alleges that on the 1st day of July, A. D. 1883, and ever since hitherto, the plaintiff was and is in the actual occupation of the property sought to be recovered by this action, and further alleges that on the 2d
14 day of July, A. D. 1883, and ever since hitherto, the defendants have withheld the possession of said premises from the plaintiff.

2d. That said amended complaint does not state facts sufficient to constitute a cause of action, in this, that the property sought to be recovered by this action is not described by legal subdivisions or by its metes and bounds *and bounds;* that the rights appurtenant to said Silver Gate tunnel and tunnel site, and for which a recovery is asked by the plaintiff against these defendants, are not mentioned and described; that the lode therewith connected or intersected by said tunnel, and for which a recovery is asked by the plaintiff against these defendants, *are* not mentioned nor described.

That said amended complaint does not show any valid subsisting pre-emption or location of the said property sought to be recoverd in this action or any part of it.

That the claim of the plaintiff to a strip of ground 5,000 feet by 500 as a tunnel site is unwarranted and unprecedented, and is not now or at any time prior hereto authorized by any local, State, or congressional law.

(Signed) FRANK M. HARDENBROOK AND
JAS. R. HAMMOND,
Att'ys for Def'ts.

I accept service of copy of above demurrer this 8th day of Sept., 1883.

(Signed) M. B. CARPENTER,
Att'y for Pl'ff.

15 Endorsed: 1256. In U. S. circuit court. Glacier M't'n Silver M. Co. *vs.* J. Frank Willis *et als.* Demurrer to amended complaint. Filed Sep. 8, 1883. (Signed) Edward F. Bishop, clerk. Frank M. Hardenbrook & Jas. R. Hammond, att'ys for def'ts.

Second Amended Complaint.

And afterwards and on, to wit, the 26th day of November, A. D. 1883, came again the said plaintiff, by M. B. Carpenter, Esq., its attorney, — filed in said court and in said cause its second amended complaint, and said second amended complaint is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court.

THE GLACIER MOUNTAIN SILVER MINING COMPANY, Plaintiff,

vs.

J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD FROTHINGHAM, Defendant.

16 For second amended complaint the plaintiff complains and alleges that it is a corporation organized and existing under the laws of the State of Ohio and is a citizen of the State of Ohio; that the defendants are and each of them is a citizen of the State of Colorado, and that the property in controversy exceeds the value of $500.

Plaintiff further alleges that on the 21st day of June, 1865, one Joseph Coley and one George C. Reeves, each being citizens of the United States, went upon the public domain of the United States theretofore wholly unoccupied and unclaimed and located on said day a tunnel and tunnel site at the base of Glacier Mountain, in Snake River mining district, county of Summit, State of Colorado.

That afterwards and on the same day they marked the boundaries of their said location and commenced to run a tunnel into said Glacier Mountain, and after fully complying with the laws of the United States, the laws of the State of Colorado, and the local rules and regulations of the said Snake River mining district, they caused to be made out and recorded in the recorder's office of the county of Summit aforesaid a location certificate of said tunnel claim, which said certificate described the location and boundaries of said tunnel claim.

That from the day of said location until the ouster hereinafter set forth the said locators of said tunnel claim and their grantees remained continuously in possession of said tunnel claim, work-
17 ing and mining thereon, and have expended thereon more than the sum of $5,000.

That the plaintiff is the owner of the said tunnel claim above described by location and purchase, and is now entitled to the quiet and peaceable and exclusive possession thereof by virtue of a full compliance on its part and on the part of its grantors with the laws,

rules, and customs above set forth; that the plaintiff and its grantors have been in the peaceable and undisputed possession of said tunnel claim, by virtue of such location, occupation, pre-emption, and record, for more than five years prior to the ouster hereinafter complained of.

That plaintiff and its grantors, for more than five consecutive years prior to the acts of the defendants hereinafter mentioned, paid all taxes legally or otherwise assessed upon said tunnel claim, and have worked and mined the same from said 21st day of June, 1865, up to the time of the acts of the defendants hereinafter set forth.

That the said tunnel claim so located embraces many valuable lodes or veins which have been discovered, worked, and mined by the plaintiff and its grantors.

That the said tunnel claim was by it- locators named the Silver Gate tunnel claim, and is described more fully as follows: Commencing at the base of said Glacier Mountain east of Bear
18 creek and running southeast and parallel with Coley tunnel through said mountain five thousand feet from the mouth or starting point of said tunnel at a stake marked and in or at the mouth of said Silver Gate tunnel, and two hundred and fifty feet northeast and two hundred and fifty feet southwest from said stake or tunnel to its termination.

Said tunnel site is situate on Glacier Mountain, in Snake River mining district, county of Summit and State of Colorado, and is five thousand feet in length by five hundred feet in width.

Plaintiff further alleges that while it was in the quiet and peaceful possession of said tunnel claim and every part thereof the defendants, wrongfully and without right and without consent of the plaintiff, to wit, on or about the 2nd day of July, 1883, entered upon the premises and into said tunnel so run by plaintiff and its grantors on said claim, and wrongfully and unlawfully ousted the plaintiff therefrom, claiming the said tunnel as the War Eagle.

That on or about said last-mentioned date the defendants, without right, made a pretended location of a lode claim across said tunnel and within said tunnel claim, and therein wrongfully ousted the plaintiff therefrom, claiming that they had discovered a lode which they called the Tempest lode.

19 That the defendants have ever since hitherto unlawfully and wrongfully withheld the possession of the said premises and tunnel claim from the plaintiff, to its damage in the sum of $1,000.

Wherefore plaintiff demands judgment against the defendants—

1. For the recovery of the possession of said Silver Gate tunnel, tunnel site, and claim.

2. For the sum of $1,000 damages for the wrongful withholding thereof.

3. For costs of suit.

(Signed) M. B. CARPENTER,
Attorney for Plaintiff.

Service accepted this 24th day of November, A. D. 1883.
(Signed) FRANK M. HARDENBROOK,
Att'y for Def'ts.

Endorsed: 1256. Circuit court of the U. S., district of Colorado. Glacier M't'n Silver Mining Company *vs.* J. Frank Willis, *et als.* 2d amended complaint. Filed Nov. 26, 1883. (Signed) Edward F. Bishop, clerk. M. B. Carpenter, attorney for plaintiff.

Demurrer to Second Amended Complaint.

20 And afterwards and on, to wit, the 27th day of November, A. D. 1883, came again the said defendants, by their attorney aforesaid, and filed in said court and in said cause their demurrer to the second amended complaint heretofore filed herein, and the said demurrer is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States in and for the District of Colorado.

THE GLACIER MOUNTAIN SILVER MINING COMPANY, Plaintiff,

vs.

J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD M. FROTHINGHAM, Defendants.

The above-named defendants demur to the second amended complaint of the said plaintiff, and for cause of demurrer allege that said complaint does not state facts sufficient to constitute a cause of action, in this:

First. That the property sought to be recovered in this action is not described by its legal subdivisions nor by its metes and bounds.

Second. That the lodes alleged to be embraced within the said tunnel-site location, and for which a recovery is asked by the said plaintiff, are not mentioned nor described, nor any location
21 of them or any of them alleged.

Third. That said complaint does not show any valid and legal subsisting pre-emption or location of said Silver Gate tunnel site.

Fourth. That the claim of the said plaintiff to a strip of ground 5,000 feet in length by 500 feet in width as a tunnel site is unwarranted and unprecedented and was not at the date of said pretended location nor at any time subsequent thereto authorized by any local, State, or congressional law. Wherefore the defendants pray judgment.

(S'g'd) FRANK M. HARDENBROOK,
Att'y for Def'ts.

Copy delivered to Carpenter this 27th day of November, 1883.

Endorsed: 1256. In the United States circuit court. Glacier Mountain Silver Mining Co. *vs.* J. Frank Willis *et als.* Demurrer to second amended complaint. Filed Nov. 27, 1883. (S'g'd) Edward F. Bishop, clerk. Frank M. Hardenbrook, att'y for def'ts.

22 *Order. Demurrer to Second Amended Complaint Sustained. Complaint Dismissed.*

And afterwards and on, to wit, the 3d day of December, A. D. 1883, the same being one of the regular juridical days of the October term, A. D. 1883, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

THE GLACIER MOUNTAIN SILVER MINING COMPANY

vs.

J. FRANK WILLIS, CHARLES BUCKLAND, and DONALD M. FROTHINGHAM.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by M. B. Carpenter, Esq., its attorney, and the said defendants, by F. M. Hardenbrook, Esq., their attorney, also come.

And the demurrer of the said defendants to the second amended complaint herein having heretofore come on to be heard and having been argued by counsel, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said complaint as amended is not sufficient in law for the said defendant to answer unto.

Wherefore, on motion of the said plaintiff, it is considered by the court that this cause be dismissed; that the said defendants go hence hereof without day and have and recover of and from the said plaintiff their costs by them in this behalf laid out and expended, to be taxed, and have execution therefor.

Bond on Writ of Error.

And afterwards and on, to wit, the 18th day of January, A. D. 1884, came again the said plaintiff and filed in said court and in said cause its bond and sued out of said court a writ of error and
23 citation to the Supreme Court of the United States, and the said bond is in words and figures as follows, to wit:

24 Bond in appeal or error, United States court, Colorado.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that the Glacier Mountain Silver Mining Company and David A. Gage & Charles Preston, as surety, are held and firmly bound unto J. Frank Willis, Charles Buckland, and Donald M. Frothingham in the full and just sum of five hun-

dred dollars, to be paid to the said J. Frank Willis, Charles Buckland, and Donald M. Frothingham; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of January, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at the October term, A. D. 1883, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between The Glacier Mountain Silver Mining Company, plaintiff, and J. Frank Willis, Charles Buckland, and Donald M. Frothingham, defendants, judgment was rendered against the said Glacier Mountain Silver Mining Company, and said company having obtained a writ of error to reverse the judgment of the said court, and a citation, directed to the said J. Frank Willis, Charles Buckland, and Donald M. Frothingham, citing and admonishing them to be and appear at the Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Glacier Mountain Silver Mining Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) THE GLACIER MOUNTAIN SILVER MINING COMPANY,
By CHAS. PRESTON, *Its Agent.* [SEAL.]
(S'g'd) CHAS. PRESTON. [SEAL.]
(S'g'd) DAVID A. GAGE. [SEAL.]

Approved Jan. 18, '84.
(S'g'd) MOSES HALLETT, *Judge.*

25 [Endorsed:] Gen. No. 1256. Circuit court of the United States, district of Colorado. Glacier Mountain Silver Mining Company *vs.* J. Frank Willis *et al.* Bond for writ of error. $500.00. Filed this 18th day of January, A. D. 1884. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk.

Justification.

THE UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

Charles Preston and David A. Gage, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth, in real & personal property, the sum below set opposite his name—that is to say, as to Charles Preston, over two thousand dollars; as to David A. Gage, over two thousand dollars; as to —— ——, —— dollars—over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

(S'g'd) CHAS. PRESTON.
" DAVID A. GAGE.

Subscribed and sworn to before me, at Denver, this 15th day of January, A. D. 1884.

[SEAL NOTARIAL.] (S'g'd) WM. A. WILLARD,
Notary Public.

And the said writ of error is hereto attached, to wit:

Writ of Error.

26 Writ of error to circuit court U. S., district of Colorado.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court between The Glacier Mountain Silver Mining Company, plaintiff, and J. Frank Willis, Charles Buckland, and Donald M. Frothingham, a manifest error hath happened, to the great damage of the said Glacier Mountain Silver Mining Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of January, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the 108th year.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*

Allowed by—
MOSES HALLETT,
Dist. Judge.

27 [Endorsed:] Gen. No. 1256. Supreme Court of the United States. The Glacier Mountain Silver Mining Company, plaintiff in error, *vs.* J. Frank Willis *et als.*, def'ts in error. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 19 day of Jan'y, A. D. 1884. Edward F. Bishop, clerk, by —— ——, deputy clerk. M. B. Carpenter & Amos Steck, attorneys for plaintiff in error. [In pencil:] Jan. 19, 1884. Served att'y for def'ts in error with copy of writ of error. M. B. C.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 15th day of March, A. D. 1884.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By —— ——, *Deputy Clerk.*

The plaintiff in error having complied with section 1007, Revised Statutes of the United States, this writ is therefore a supersedeas.

EDWARD F. BISHOP,
Clerk Cir't Court U. S.

And the said citation is hereto attached, to wit:

Citation.

28 Citation, U. S. circuit court.

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to J. Frank Willis, Charles Buckland, and Donald M. Frothingham, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within & for the district of Colorado, wherein The Glazier Mountain Silver Mining Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 18th day of January, in the year of our Lord one thousand eight hundred and eighty-four.

MOSES HALLETT, *Judge.*

29 [Endorsed:] Gen. No. 1256. Circuit court of the United States, district of Colorado. The Glazier Mountain Silver Mining Company, plaintiff in error, *vs.* J. Frank Willis, *et als.*, de-

fendants in error. Citation. Filed in circuit court of the U. S. this 19 day of Jan'y, A. D. 1884. Edward E. Bishop, clerk, by —— ——, deputy clerk. M. B. Carpenter & Amos Steck, attorneys for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

On this 19th day of January, A. D. 1884, personally appeared Mason B. Carpenter before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to Frank M. Hardenbrook, attorney of record for defendants and defendants in error, J. Frank Willis, Charles Buckland, and Donald M. Frothingham, at Denver, in said district of Colorado, on the 19th day of Jan., 1884.

MASON B. CARPENTER.

Sworn to and subscribed before me this 19th day of Jan'y, A. D. 1884.

[Seal United States District Court, District of Colorado.]

EDWARD F. BISHOP,
Clerk Dist. Court U. S.,
By —— ——, *Deputy Clerk.*

30 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein The Glacier Mountain Silver Mining Company was plaintiff and J. Frank Willis *et al.* were defendants, as fully and completely as the same still remains on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of the said court, at Denver, in said district, this 15th day of March, A. D. 1884.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Fees on transcript:

51 folios, @ 10c.	5 10
Certificate	35
	$5 45

P'd by M. B. Carpenter, for pl'ff Co.

Endorsed on cover: Colorado C. C. U. S. No. 166. The Glacier Mountain Silver Mining Company, plaintiff in error, *vs.* J. Frank Willis, Charles Buckland, and Donald M. Frothingham. Filed 1st November, 1884.

127-471

127-471

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE GLACIER MOUNTAIN SILVER MINING COMPANY

vs.

J. FRANK WILLIS, *et al.*

No. 166.

Affidavits.

The said Glacier Mountain Silver Mining Company, plaintiff in error, now comes and moves the court to set aside its order made on the 6th day of February, 1888, dismissing said cause for want of jurisdiction and for leave to show that the property in controversy in said cause did at the commencement of said suit and now does exceed five thousand dollars in value, and therefore that this court has jurisdiction of this cause.

WALTER H. SMITH,
Attorney for Plaintiff in Error.

STATE OF OHIO, *Hamilton County.* } ss:

I, Isaac Graveson, being first duly sworn, say that I reside at Glendale, Hamilton county, Ohio, that I am well acquainted with the Silver Gate Tunnel claim, situate at the base of the Glacier Mountain in Snake River mining district, in Summit county, Colorado, being the same premises and property that is now in controversy in the case now pending in the Supreme Court of the United States, wherein the Glacier Mountain Silver Mining Company, is plaintiff in error, and J. Frank Willis, *et al.* are defendants in error, being No. 166 of the October term, 1887. I am part owner of the said property and personally examined the same a short time previous to the defendants taking possession of the same, and know that more than twenty thousand dollars had been expended on said property, and that its value on the 1st day of July, 1883, and at all times since that date, exceed the sum of five thousand dollars. I have been an officer of said Glacier Mocntain Silver Mining Company, as President, Secretary or Treasurer since its organization.

ISAAC GRAVESON.

Sworn to before me and subscribed in my presence this 24th day of February, A. D., 1888.

J. C. ROBINSON, JR,
Notary Public,
Hamilton County, Ohio.

[SEAL.]

SUPREME COURT OF THE UNITED STATES.

October, Term 1887.

THE GLACIER MOUNTAIN SILVER MINING COMPANY
vs.
J. FRANK WILLIS, *et al.*
No. 166.

The said Glacier Mountain Silver Mining Company, plaintiff in error, now comes and moves the Court to set aside its order made on the 6th of February 1888, dismissing said cause for want of jurisdiction, and for leave to show that the property in controversy in said cause did at the commencement of said suit and now does exceed Five thousand dollars in value, and therefore that this Court has jurisdiction of this cause.

WALTER. H SMITH,
Attorney for Plaintiff in Error.

STATE OF OHIO,
Hamilton County. } *ss:*

I, Goodrich H. Barbour, being first duly sworn, say that I reside at Cincinnati, Hamilton county, Ohio, that I am well acquainted with the Silver Gate Tunnel claim, situated at the base of Glacier Mountain, in Snake River mining district, in Summit county, Colorado, being the same premises and property now in controversy in the case now pending in the Supreme Court of the United States, wherein the Glacier Mountain Silver Mining Company is plaintiff in error, and J. Frank Willis *et al.*, are defendants

in error, being No. 166 of the October Term, 1887. That I have been a stockholder in said Glacier Mountain Silver Mining Company since 1876 and was induced to purchase this by the personal knowledge of a near relative and others who had visited the mine and from reliable correspondence up to the present time. I have not changed my opinion as to the value of said mine. I consider the said mine to be worth more than $5,000.00. Would not sell my stock on a basis of treble this amount; that I have been a director since 1877, and from my personal knowledge, the Company have paid in assessments for improvements on said property, nearly five thousand dollars. GOODRICH H. BARBOUR.

Sworn to before me and subscribed in my presence this 24th day of February, A. D., 1888.

[NOTARY SEAL.] E. J. HOWARD,
Notary Public, Hamilton County, Ohio.

UNITED STATES OF AMERICA, }
State of Colorado. }

IN THE CIRCUIT COURT.

THE GLACIER MOUNTAIN SILVER MINING COMPANY
vs.
J. F. WILLIS, CHARLES BUCKLAND AND DONALD M. FROTHINGHAM. } No. 1,256.

Writ of Error to Supreme Court United States.

On this twenty-fifth day of February, A D. 1888, personally appeared Charles P. Baldwin, who, being

first duly sworn, on oath deposes and says, that he is a citizen of the United States and more than twenty-one years of age; that he has been for the past twenty years and still is employed as mining superintendent in Clear Creek County, Colorado; that about eight years ago he was employed by the president of the Glacier Mountain Silver Mining Company to examine the property of said Company situate and being on Glacier Mountain in Summit County, Colorado; that he made a careful examination of said property, and that it was worth at that time, and is now worth more than Five Thousand Dollars.

CHARLES P. BALDWIN.

Subscribed and sworn to before me this 25th day of February, 1888. H. A. ATKINS.

[CLERK'S SEAL.] *Clerk of Dist. Court.*

UNITED STATES OF AMERICA, }
State of Colorado. }

IN THE CIRCUIT COURT.

THE GLACIER MOUNTAIN SILVER MINING CO.
vs.
J. F. WILLIS, CHARLES BUCKLAND AND DONALD M. FROTHINGHAM. } No. 1,256.

Writ of Error to Supreme Court of United States.

THE STATE OF KANSAS, }
Marshall County, } *ss:*

Charles Preston, of lawful age, being first duly sworn, according to law, upon his oath deposeth and

saith, that he is personally well-acquainted with the Glacier Mountain Silver Mining Company's property in the Snake River Mining District, in Summit County, in the State of Colorado, being the property represented in the above-entitled suit, and that said affiant is personally well-acquainted with the value of said property; that said affiant has been mining in that District for six years last past, and is personally acquainted with the property represented in the foregoing entitled suit, and is well-acquainted with the value of said property, and other mining properties of that District, and that the said Glacier Mountain Silver Mining Property is worth over five thousand dollars, and further this affiant saith not.

CHARLES PRESTON.

Subscribed and sworn to before me this 24th day, February, A. D. 1888, by Charles Preston.

In witness whereof I have hereunto subscribed my name, and affixed my Official Seal this 24th day of February, A. D. 1888.

B. SMITH,
Notary Public.

[NOTARY SEAL.]

THE DISTRICT OF COLUMBIA,
Washington County, } *ss:*

I, Walter H. Smith, being first duly sworn, say that I did, on the 29th day of February, A. D. 1888, deposit in the Post Office at Washington City, in said district, a letter directed to George Norris, Temple Court, corner of Beekman and Nassau streets, New York City, (the said Norris being the attorney

of record for the defendants in error in the above named case of *the Glacier Mountain Silver Mining Company* vs. *J. Frank Willis et al*,) which said letter contained a certified copy of the order made by this Court on the 13th day of February last, in said cause; a copy of the affidavit of Oscar H. Curtis, heretofore filed and printed and a copy of the affidavits of Isaac Graveson, Goodrich H. Barbour, Charles Preston and Charles P. Baldwin, herein above set forth, all of which were filed in the clerk's office prior to or on the 29th day of February last, I further say that I obtained the post-office address of the said George Norris from the clerk of this Court.

WALTER H. SMITH.

Subscribed and sworn to before me this 15th day of March, 1888.

JAMES H. GRIDLEY,
Notary Public.

[NOTARY SEAL.]

7-471

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 166.

THE GLACIER MOUNTAIN SILVER MINING COMPANY

vs.

J. FRANK WILLIS ET AL.

The said Glacier Mountain Silver Mining Company, plaintiff in error, now comes and moves the Court to set aside its order made on the 6th of February, 1888, dismissing said cause for want of jurisdiction and for leave to show that the property in controversy in said cause did at the commencement of said suit and now does exceed five thousand dollars in value, and therefore that this Court has jurisdiction of this cause.

WALTER H. SMITH,
Attorney for Plaintiff in Error.

DISTRICT OF COLUMBIA,
County of Washington, } ss:

I, Oscar H. Curtis, being first duly sworn, say that I reside at Oxford, Chenango county, New York; that I am well acquainted with the Silver Gate Tunnel claim, situate at the base of the Glacier Mountain, in Snake River mining district, in Summit county, Colorado, being the same prem-

ises and property that is now in controversy in the case now pending in the Supreme Court of the United States, wherein the Glacier Mountain Silver Mining Company is plaintiff in error and J. Frank Willis *et al.* are defendants in error, being No. 166 of the October term, 1887. I at one time was the owner of said property. I purchased it at sheriff's sale and paid therefor over twelve thousand dollars. I know that more than twenty thousand dollars has already been expended in developing said property, and I have no hesitation in saying that the value of said premises and property on the first day of July, 1883, and at all times since that date, exceeded the sum of five thousand dollars.

OSCAR H. CURTIS.

Subscribed and sworn to before me this 7th day of February, 1888.

[SEAL.] JAMES D. MAHER,
Notary Public.

[Endorsed:] Supreme Court U. S. 1887, October term. No. 166. The Glacier Mountain Silver Mining Company, pl'ff in error, *vs.* J. Frank Willis *et al.* Motion to set aside judgment of dismissal of Feb. 6, 1888, and affidavit of Oscar H. Curtis as to value of property in dispute.

[Stamped:] Office Supreme Court U. S. Filed Feb. 7, 1888. James H. McKenney, clerk.

7-491

Office Supreme Court U. S.
FILED.
DEC 15 1887
JAMES H. McKENNEY.
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE GLACIER MOUNTAIN SILVER MINING COMPANY,
Plaintiff in Error,

vs.

J. FRANK WILLIS *et al.*

No. 166.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Brief for Plaintiff in Error.

WALTER H. SMITH,
ELLERY C. FORD,
Atty's for Plff's in Error.

R. O. POLKINHORN, PRINTER.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE GLACIER MOUNTAIN SILVER MINING COMPANY,
Plaintiff in Error,

vs.

J. FRANK WILLIS *et al.*

No. 166.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Brief for Plaintiff in Error.

The plaintiff is a corporation existing under the laws of Ohio.

The defendants are citizens of the State of Colorado.

The plaintiff brought its action in the United States Circuit Court for Colorado, against the defendants, July 11, 1883. Its cause of action is set forth in the second amended complaint, commencing on page 9 of the record. In this complaint it alleges, in substance, after reciting citizenship, and that the

value of the property in controversy exceeds $500, that Joseph Cooley and George C. Reeves, citizens of the United States, through whom it claims, located June 21, 1865, a tunnel and tunnel site on *unoccupied and unclaimed* public lands of the United States, and at the base of Glacier Mountain, in Snake River Mining District, Summit County, Colorado; that on the same day they marked the boundaries of their location, and commenced to run their tunnel into the said Glacier Mountain, and that they complied with all the laws of the United States and the State of Colorado, and the local rules and regulations of said Snake River Mining District; that from said date until the ouster by defendants they and their grantees remained continuously in possession of said tunnel and tunnel claim, and had expended more than $5,000 thereon; that plaintiff was the owner of said tunnel claim by location and purchase, and entitled to the quiet, peaceable and exclusive possession thereof, and had been in the peaceable and undisputed possession thereof for more than five years before the ouster by defendants, and had paid all taxes assessed against the same for more than five consecutive years, and had mined and worked the same from June 21, 1865, up to the time of ouster by defendants; that said tunnel claim contains many valuable lodes or veins, all of which had been *discovered*, worked and mined by plaintiff and its grantors; that said tunnel claim was named by its locators the Silver Gate tunnel claim, and was bounded as follows: Commencing at the base of said Glacier Mountain, east of Bear Creek, and running southeast and parallel with Coley tunnel through said mountain

five thousand feet from the mouth or starting point of said tunnel, at a stake marked and in or at the mouth of said Silver Gate tunnel, and two hundred and fifty feet northeast, and two hundred and fifty feet southwest from said stake or tunnel to its termination; that said tunnel was five thousand feet in length and five hundred in width; that while the plaintiff was in the quiet and peaceable possession of said tunnel claim and every part thereof, the defendants, on the 2d of July, 1883, wrongfully and without right, and without the consent of plaintiff, entered upon said premises, and "*into said tunnel*, so run by plaintiff and its grantors on said claim, and wrongfully and unlawfully ousted the plaintiff thereon, claiming the *said tunnel* as the War Eagle;" that defendants about said last mentioned date, without any right so to do, made a pretended location of a lode claim across and within said tunnel, which they called the Tempest lode, and ousted the plaintiff therefrom; that they have ever since unlawfully and wrongfully withheld the possession of said premises and tunnel claim to its damage of $1,000.

It asks for judgment for the possession of said Silver Gate tunnel, tunnel site and claim, and for $1,000 damages and for costs.

To this complaint the defendants interposed a demurrer. (Record, p. 11.) The demurrer was sustained by the Court and the cause dismissed. (Record, p. 12.)

To this judgment of dismissal a writ of error is now prosecuted by the plaintiff, and it is assigned for error.

That the court erred in sustaining said demurrer and dismissing the case.

The statutes applicable to the present case are the following :

"Sec. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel, on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface ; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid ; but failure to prosecute the work on the tunnel for six months, shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

Revised Statutes U. S. 428.

"1801. Sec. 5. Any person or persons engaged in working a tunnel, within the provisions of this chapter, shall be entitled to two hundred and fifty feet each way from said tunnel, on each lode so discovered ; provided, they do not interfere with any vested rights. If it shall appear that claims have been staked off and recorded prior to the record of said tunnel, on the line thereof, so that the required number of feet cannot be taken near said tunnel, they may be taken upon any part thereof where the same may be found vacant ; and persons working said tunnel shall have the right of way through all lodes which may lie in its course."

General Laws, Colorado, 627.

"1694. Sec. 1. That every person in the peaceable and undisputed possession of lands or tenements, including mining claims, under claim and color of title, made in good faith, including pre-emptions

made in accordance with the laws of the State of Colorado, or any mining district wherein such property may be situate, who shall, for five successive years hereafter continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands, tenements, or mining claims, shall be held and adjudged to be the legal owners of said lands, tenements or mining claims, to the extent, and according to the purport of his or her proper title or pre-emption. All persons holding under such possession by purchase, devise or descent, before said five years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession of and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

General Laws, Colorado, 600.

From these statutes it appears that the United States statute gives the right to locate a tunnel "three thousand feet from the face of said tunnel." The "face" of the tunnel is the mouth thereof; that is the point where it is covered by the superhanging earth or rock. It also gives to the lodes discovered in the tunnel a right "to the same extent as if discovered from the surface," and that is three hundred feet on each side of the tunnel.

The Colorado statute gives "two hundred and fifty feet each way from said tunnel on each lode so discovered."

The opinion of the Court below is not found in the record, but we suppose that it must have held that the tunnel and tunnel site were void, because the location was in excess of the limits fixed by the statute of the United States. The length of the tunnel claim was five, instead of three thousand feet.

Suppose that were so, did that fact give the de-

fendants, who were naked trespassers, the right to enter the tunnel and eject the plaintiff, then in peaceable possession? As against a trespasser, the plaintiff was entitled to the whole five thousand feet. The demurrer admits the allegation of the complaint that the defendants were without right in the premises. Being in possession, the right of the plaintiff was good against all the world, except some rightful claimant.

But, if the tunnel claim of the plaintiff were excessive, it was not void. It was good for three thousand feet from the mouth of the tunnel.

This court so held in the analagous case of the *Richmond Mining Company* vs. *Rose*, 114 U. S. 576.

But we do not admit that the claim was excessive. It was located June 21, 1865, and in accordance with the local rules and regulations. That was before the first mineral statute passed by Congress (July 26, 1866), and before the first statute which ever mentioned a tunnel claim (May 10, 1872), and it may well be argued that the mineral statutes, like all others, should be construed as prospective in their operation and not intended te affect claims originated before their date.

This would be true if there were no provision in the statutes on the subject. But there is an express provision on the subject in each of said acts. The second section of the act of 1866 provided:

"That whenever any person, or association of persons, claims a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same, *according to the local customs or rules of miners in the*

district where situated, and having expended in actual labor and improvements thereon, an amount of not less than one thousand dollars," &c. (14 Stat., 251.)

This enactment was made for the purpose of protecting claims which had originated prior to the statute, and their name was legion.

The 2d section of the act of 1872 provided—

"That mining claims upon veins or lodes of quartz or other rock in place, bearing silver, cinnabar, lead, tin, copper, or other valuable deposits, *heretofore located*, shall be governed as to length along the vein, or lode, by the customs, regulations and laws in force at the date of their location." (17 Stat., 91.)

This provision is carried into the Revised Statutes, Sec. 2320. The Land Department has always acted upon the rule that all locations were to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage of any mineral law by Congress. This principle has been recognized by this Court.

In *Jackson* v. *Roby*, 109 U. S. 441, Mr. Justice Field said:

"Previous to the legislation of Congress in 1866, mining claims upon the public lands of the United States were held under rules framed by miners themselves, in different localities. These rules prescribed the extent of ground which miners could severally appropriate for mining, and the conditions upon which such ground could be acquired and held. They bore a general similarity in different districts, varying only according to the extent and